



Osgoode Hall Law School of York University
Osgoode Digital Commons

Articles & Book Chapters

Faculty Scholarship

1968

Public Interest Labour Disputes in Canada: A Legislative Perspective

Harry W. Arthurs

Osgoode Hall Law School of York University, harthurs@osgoode.yorku.ca

Source Publication:

Buffalo Law Review. Volume 17 (1968), p. 39-64.

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/scholarly_works



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Recommended Citation

Arthurs, Harry W. "Public Interest Labour Disputes in Canada: A Legislative Perspective." *Buffalo Law Review* 17 (1968): 39-64.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

HEINONLINE

Citation: 17 Buff. L. Rev. 39 1967-1968



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Tue Jul 7 08:55:04 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0023-9356](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0023-9356)

PUBLIC INTEREST LABOR DISPUTES IN CANADA: A LEGISLATIVE PERSPECTIVE

H. W. ARTHURS*

EXPLORATION by Canadians and Americans of each other's labor relations legislation should be profoundly reassuring to citizens of both countries. On the one hand, Canadians will be relieved to find that one of the world's most sophisticated industrial relations systems has yet to solve the riddle of the public interest dispute. On the other hand, Americans can rest unembarrassed: the elixir of industrial peace has not been discovered in the modest social laboratory of their northern neighbor.

Both systems are premised on the practice of collective bargaining, so that in both a strike is always a possibility. While we have been generally prepared to accept strikes as the price we pay for the freedom of the parties to resolve their differences privately, in an increasing variety of employment situations in both countries, there is a growing feeling that this price is excessive. These situations are generically described as "public interest" disputes or "emergency" disputes. Neither description is a term of art, but both carry the same connotation: some important interest of non-belligerents is being harmed or threatened by a strike or lockout; this harm is of a different kind or quality from that suffered by neutrals in any labor dispute; and for this reason the normal rules of industrial conflict should be suspended or altered to permit governmental action to restore peace.

Because governmental presence is the hallmark of the public interest dispute, the legislative framework is particularly important. When and how, to what extent, and with what effect, official action will displace private decision-making: these are the unanswered, perhaps unanswerable, questions. Much of the Canadian experience will seem familiar to American readers, naturally enough in view of common industrial practices and similar basic labor laws. Much, too, will be strange, a reflection of distinctive Canadian traditions, constitutional doctrines, and socio-economic facts. Without fully canvassing the dimensions of difference, however, a brief preliminary survey of the environment of Canadian legislation must be undertaken.

I. THE ENVIRONMENT

A. *The Constitution*

Constitutional jurisdiction over labor relations in Canada rests primarily with the provinces rather than the Federal government. Although in 1924 the Ontario courts were prepared to view labor disputes as a matter of national concern, attracting federal jurisdiction, the Judicial Committee of the Privy Council, then Canada's highest appellate tribunal, determined that relations

* Associate Professor of Law, Osgoode Hall Law School, Toronto.

between employers and employees were matters of a private nature and local concern over which the provincial legislatures enjoyed primary jurisdiction.¹ Had the position of the provincial courts prevailed, Canada would have anticipated by about ten years the *Jones & Laughlin Steel* decision² which is the constitutional cornerstone of modern American labor legislation. Given the Privy Council's holding, however, the problem of dealing with emergency and public interest disputes has been immensely complicated.

To be sure, federal jurisdiction over interprovincial and international communications and transportation, over defense and atomic energy, and over a few anomalous industries owned or closely regulated by the federal government, remains intact. This brings within the ambit of federal labor legislation such key areas of employment relations as longshoring, airlines and railways, uranium mines, and shipping.³ As well, the federal government obviously has power to regulate legislatively its relationship with its own employees. Finally, in the event of a true national emergency, such as war, federal power may constitutionally be mobilized to regulate industrial relations in the national interest.⁴ One of the unanswered questions of Canadian constitutional law is whether some less catastrophic event, such as a nation-wide strike in an important industry normally falling within provincial jurisdiction, would equally attract federal jurisdiction.⁵

Implicit in this recital of federal power is the assumption that normally provincial legislation will govern labor relations, and all provinces, as well as the federal government, have in fact passed labor relations acts. In such important industries as steel, coal, meat-packing, and automobile manufacturing, provincial legislation prevails. Because of the 1925 Privy Council decision, Canadian courts have been loath to embrace the view that the interprovincial or international flow of goods to or from a plant, in and of itself, justifies national legislative control.⁶ Critical areas of public or quasi-public employment such as hospitals, municipalities, police forces and fire departments are likewise subject to provincial law. Indeed, it was the attempt to apply federal legislation to a municipal

1. *Toronto Electric Comm'rs v. Snider*, [1925] A.C. 396, [1925] 2 D.L.R. 5, [1925] 1 W.W.R. 785, *rev'g* 55 Ont. L.R. 454, [1924] 2 D.L.R. 761, [1924] 1 D.L.R. 101.

2. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1936).

3. See B. Laskin, *Constitutional Law* 434 (3d ed. 1966); Scott, *Federal Jurisdiction Over Labour Relations: A New Look*, 6 McGill L.J. 153 (1959-60). The federal claim to jurisdiction is found in the Industrial Relations and Disputes Investigation Act, Can. Rev. Stat. c. 152, § 53 (1952).

4. See Laskin, *Recent Labour Legislation in Canada*, 22 Can. B. Rev. 776 (1944). See also *Local 100, United Steel Workers of Am. v. Steel Co. of Can., Ltd.*, [1944] Ont. 299, 302-03, [1944] 2 D.L.R. 583, 586-88, [1944] Ont. W.N. 281, 283-84 (Lab. Ct.).

5. In *Swait v. Trustees of Maritime Transp. Unions*, [1967] Qué. B.R. 315, 61 D.L.R.2d 317 (1966), the court upheld the constitutional validity of a federal statute imposing government trusteeship on a number of unions representing maritime workers on the great lakes. While the statute was designed to end a series of disruptive work stoppages caused by inter-union rivalry, the majority of the court relied upon federal jurisdiction over navigation and shipping. Only Brossard, J., was prepared to uphold the statute on the basis that the disruption of shipping created "a state of emergency 'going beyond local or provincial concern or interests' which should 'from its inherent nature be the concern of the Dominion as a whole' . . ." *Id.* at 325, 61 D.L.R.2d at 332.

6. See, e.g., *Regina v. OLRB*, ex rel. Dunn, [1963] 2 Ont. 301, 39 D.L.R.2d 346.

electric system which may well have provoked the Privy Council into its decision.⁷ Given clear provincial responsibility for municipal institutions,⁸ a worse test case for federal jurisdiction could hardly have been found.

In terms of the effective regulation of disputes in key industries, the absence of federal power has not been catastrophic, if only because practical men appear not to be unduly influenced by constitutional niceties. For example, a major trucking strike in Ontario in the summer of 1966 disrupted both local and inter-provincial transportation. Without attempting to draw lines of demarcation between their respective jurisdictions, both federal and provincial governments intervened co-operatively to provide conciliation services. Perhaps this collaboration reflected a lesson learned from the much less happy attempt at federal-provincial mediation of a nation-wide meat packing strike in 1947. An attempt to co-ordinate peacekeeping efforts through a meeting of federal and provincial representatives terminated in acrimonious debate, and officials of the various governments went home "nursing their provincial autonomies."⁹ In due course, the strike was settled without any official government action.

To the extent that constitutional jurisdiction has been responsible for localized rather than nation-wide bargaining units, it might be thought to have contributed to the avoidance of national emergencies. The shutdown of a producer of one important industrial product will not have as serious an impact upon the nation's economy if another producer in another province can to some extent alleviate the shortage. However, as will be seen, this apparent constitutional gratuity is of little practical significance.

B. Socio-economic Factors

The organization of the nation's economy, like its constitution, should in theory exert a centrifugal influence on the formulation of policy. Ontario, at least until recently, has been the home of the nation's steel industry and of all automobile manufacturing. Oil production is still largely localized in Alberta, and coal mining has been primarily confined to that province and to Nova Scotia. Thus, provincial rather than federal authorities have assumed the responsibility for settling disputes in these important industries. Yet the theoretical handicap of provincial decision-making is partially offset by the concentration of industry. So long as the dispute is confined within a single jurisdiction, effective legislative and administrative action remains possible. Ontario, for example, can and regularly does keep the peace in the nation's steel industry.

The relatively small scale of heavy industry in Canada, and the availability of imported goods, further diminishes the importance of disputes in these industries and their impact upon the national welfare. In this connection, Canada's role as a middle power, modest military establishment, and her freedom from

7. *Toronto Electric Comm'rs v. Snider*, [1925] A.C. 396, [1925] 2 D.L.R. 5, [1925] 1 W.W.R. 785, *rev'g* 55 Ont. L.R. 454, [1924] 2 D.L.R. 761.

8. *British North America Act*, 1867, 30 & 31 Vict., c. 3, § 92(8).

9. See Scott, *supra* note 3, at 162.

the heavier burdens of cold-war politics, have spared her the mixed blessings of a significant "defense" industry, and of the attendant risks of labor disputes in that industry.

These characteristics of Canadian industrial organization eliminate many of the difficulties of defining national emergency and public interest disputes which have plagued American writers.¹⁰ At least, little argument can be made for the proposition that in Canada a prolonged labor dispute in the automobile, aircraft or steel industries poses a threat to national security or to economic stability. By the same token, the terms of contract settlements in those industries do not create the same repercussions throughout the economy as do comparable settlements in the United States. In peacetime, disruption of transportation stands almost alone as a national emergency or public interest situation.

At the provincial level, the "emergency" label is largely reserved for industries which touch public health and safety. This is not to say that the definitional exercise can be avoided entirely. As will be seen, considerable energy has been devoted to the identification of true emergencies, at the provincial level, particularly where the local economy is based entirely upon a single industry.

Finally, public ownership of many crucial community services is much more widespread in Canada than in the United States. For example, the federal government owns one of two major railway systems, one of two major airlines, and one of two national communications networks. Most major ports are operated under the direction of harbor commissioners appointed by the federal government, and key ferry services connecting two island provinces to the mainland are government-owned. Provincial and municipal governments, as well, own and operate a broad range of public utilities, including electricity and gas production and distribution, local transit and ferry services, and, although its relevance to this analysis is marginal, a monopoly on the retail sale of alcoholic beverages.

To the extent that government's participation in industrial relations as an employer heightens the public interest in a labor dispute, a more interventionist philosophy might be expected to prevail in Canada. As will be seen, however, the trend is otherwise, and public ownership is not *per se* a badge of exceptional public interest in a particular dispute. On the other hand, public ownership may often create in Canada a monopoly or oligopoly situation where none exists in the United States. A strike against a municipal transit commission which operates all forms of public transportation will create much greater dislocation in the community than a strike against a privately-owned subway system which leaves unaffected alternative modes of travel such as busses. Similarly, a nationwide strike on one of the two major railway systems would cripple Canada's economy to a much greater extent than a strike in one of several competing local lines in the United States. This is particularly true in respect of vast

10. See generally *Emergency Disputes and National Policy* (I. Bernstein, H. Enarson & R. Fleming eds. 1955); Horlacher, *A Political Science View of National Emergency Disputes*, 333 *Annals* 85 (1961).

mining and farming areas, served by one carrier whose operation is the only means of bringing supplies into the community, and taking its single product out. While some of these differences between Canada and the United States may be diminished by the practice of multi-employer bargaining in the latter country, the potential costs of a railway strike in Canada, given the scale and composition of its economy, are relatively much greater. In political terms, this increased risk creates pressures for government action which are often irresistible.

C. History

Down to the advent of collective bargaining legislation on the Wagner Act model in the 1940's,¹¹ Canadian labor statutes had two distinctive characteristics. First, there was a tendency to view the public interest dispute as the typical dispute, and second (perhaps as a reflection of the first point) there was an almost obsessive concern with peace-keeping.

The public interest dispute first attracted the attention of federal legislators in 1877, when an act was passed which effectively outlawed strikes on railways and public utilities, by imposing criminal penalties on employees who interrupted service by breaching their contracts of employment.¹² This Draconian approach soon gave way to a series of early peace-keeping experiments. Several of these experiments, both provincial and federal, were attempts to provide a general formula for the conciliation of all labor disputes.¹³ Virtually all of these experiments were stillborn.¹⁴ Of greater practical significance were statutes providing for mediation, conciliation or arbitration of disputes affecting coal mines,¹⁵ railways, and public utilities,¹⁶ at the provincial level, and ultimately all three critical areas at the federal level.¹⁷

11. Collective Bargaining Act, [1943] Ont. Stat. c. 4; Wartime Labour Relations Regulations, P.C. 1003 (1944), *passed pursuant to* The War Measures Act, Can. Rev. Stat. c. 206 (1927). For the evolution of collective bargaining legislation in Canada see A. Carrothers, *Collective Bargaining Law in Canada* pt. I (1965).

12. Breaches of Contract Act, [1877] Can. Stat. c. 35, § 2, *now located in* Crim. Code, [1953-54] Can. Stat. c. 51, § 365(1) (1954). Section 365(2) relieves from liability any employee striking after exhaustion of all relevant requirements of applicable dispute settlement legislation.

13. Trades Arbitration Act, [1873] Ont. Stat. c. 26; Trade Disputes Act, Ont. Rev. Stat. c. 42 (1894); Labour Conciliation Act, [1893] B.C. Stat. c. 21; Labour Conciliation and Arbitration Act, [1894] B.C. Stat. c. 23; Conciliation Act, [1900] Can. Stat. c. 24; Trade Disputes Act, [1901] Que. Stat. c. 31.

14. See generally F. Anton, *The Role of Government in the Settlement of Industrial Disputes in Canada*, chs. 4, 5 (1962).

15. Miners Arbitration Act, [1888] N.S. Stat. c. 3 (compulsory arbitration of wage disputes in coal mines), *replaced by* Industrial Peace Act, [1925] N.S. Stat. c. 1 (non-binding conciliation followed by binding arbitration, for labor disputes in mines and public utilities).

16. Railway and Municipal Board Act, [1906] Ont. Stat. c. 31 §§ 58, 59 (voluntary arbitration and non-binding mediation and fact-finding provided for labor disputes in public utilities, railways, and street railways); Municipal Strikes and Lock-outs Act, [1921] Que. Stat. c. 46 (compulsory non-binding arbitration provided for policemen, firemen, waterworks employees, and employees engaged in burning garbage).

17. Railway Labour Disputes Act, [1903] Can. Stat. c. 55 (non-binding conciliation, arbitration); Conciliation and Labour Act, [1906] Can. Stat. c. 96 (general voluntary conciliation); compulsory conciliation on railways); Industrial Disputes Investigation Act, [1907] Can. Stat. c. 20 (compulsory conciliation, postponement of strikes, in labor disputes

The earliest statutes required both parties to agree to the invocation of conciliation procedures,¹⁸ but gradually this requirement was displaced by provision for conciliation either on the unilateral request of one party¹⁹ or as the result of governmental initiative.²⁰ While the burden of agreeing to conciliation was shifted from the parties, it was replaced by a much heavier one: they were obliged to refrain from open conflict until all peace-keeping procedures had run their course.²¹

The federal Industrial Disputes Investigation Act of 1907, embodying these principles, covered workers employed "in any mining property, agency of transportation or communication, or public service utility."²² A constitutional prophet might have foreseen that twenty years later the Privy Council would confine its operation to employment which, for general regulatory purposes, fell within the federal realm; but in terms of the development of policy approaches, this was a secondary consideration. Although the provinces have largely assumed the burden of lawmaking, and although collective bargaining is now a primary characteristic of Canadian labor relations acts, the 1907 approach is still discernible today. Compulsory conciliation and the postponement of strikes have become a regular feature of collective bargaining.²³

Commentators have correctly observed²⁴ that dispute settlement techniques appropriate to emergency disputes can have a detrimental effect when adapted to the run-of-the-mill strike. The brighter side of this historical development, however, is that a policy of public intervention to keep the peace in public interest disputes is less anomalous in the Canadian context than in the United States because of its longevity and accustomed prominence throughout the whole industrial relations system.

Against this constitutional, socio-economic, and historical background, we can now examine current patterns of legislative response to emergency disputes.

II. PATTERNS OF LEGISLATION

A. *Government as an Employer*

It has been a cliché of labor relations in the United States that collective bargaining for government employees should be approached cautiously, if at

involving "any mining property, agency of transportation or communication, or public service utility").

18. See, e.g., Conciliation Act, [1900] Can. Stat. c. 24, § 4(c).

19. Industrial Disputes Investigation Act, [1907] Can. Stat. c. 20, § 5.

20. Conciliation and Labour Act, [1900] Can. Stat. c. 96, §§ 6, 13.

21. Industrial Disputes Investigation Act, [1907] Can. Stat. c. 20, §§ 56, 57.

22. *Id.* § 2(c).

23. See, e.g., Industrial Relations & Disputes Investigation Act, Can. Rev. Stat. c. 152, § 21 (1952); Labour Relations Act, Ont. Rev. Stat. c. 202, § 54 (1960); Labour Relations Act, B.C. Rev. Stat. c. 205, § 45 (1960).

24. See, e.g., *Canadian Policy Experiments with Public-Interest Disputes*, 14 Lab. L.J. 739, 742 (1963); See also Patterns of Industrial Dispute Settlement in Five Canadian Industries (H. Woods ed. 1958); Jamieson, *Industrial Relations and Government Policy*, 17 Can. J. Econ. & Pol. Sci. 25 (1951); Phillips, *Government Conciliation in Labour Disputes*, 22 Can. J. Econ. & Pol. Sci. 523 (1956); Woods, *Canadian Collective Bargaining and Dispute Settlement Policy: An Appraisal*, 21 Can. J. Econ. & Pol. Sci. 447 (1955).

all. Despite recent developments in the direction of fuller freedom to bargain collectively at the federal level, and in a minority of the states,²⁵ American policymakers still appear to be dubious about the validity of a fullblown labor relations system for public servants.²⁶ Perhaps no obstacle to acceptance by government of private sector labor policies is greater than the haunting fear of a strike. That government functions must continue uninterrupted by a work stoppage is treated as a self-evident, if not a constitutional, truth.²⁷ Canada, somewhat uncharacteristically, has overcome its historic respect for the supremacy of Parliament and for the superiority of American industrial policies, with the result that Canadian governmental labor relations statutes increasingly demonstrate the disappearing dichotomy between the public and private sectors.²⁸

In this respect, the province of Saskatchewan was an early pioneer having extended full rights to organize and strike to employees of the provincial government as early as 1944.²⁹ While other jurisdictions are obviously moving in the direction of normalizing their relationships with the collective bargaining representatives of their employees, the recent federal Public Service Staff Relations Act³⁰ and the Quebec Labour Code,³¹ represent the greatest progress in this direction. Without examining either of these statutes in detail, suffice it to say that the former borrows from the private sector virtually all of the familiar principles including the rights to organize, bargain collectively, and strike, and sets them into a special administrative framework for federal civil servants. The latter statute, in Quebec, simply brings public servants within the ambit of general labor relations legislation. Finally, in virtually all provinces, municipalities and their emanations are now treated as ordinary employers, and are subject to labor relations acts of general application.

The general trend in public employment, then, is to discard the constitutional and political mythology of sovereign immunity. This new and realistic approach, however, has its price. For the first time it has become necessary to distinguish general governmental functions from those whose continued operation is essential to the health, safety and well-being of the community. Some means had to be found for identifying these essential functions, and for giving due weight to their special characteristics in the settlement of disputes.

The Quebec Labour Code, a general statute, contains special provisions

25. See Anderson, *The U.S. Experience in Collective Bargaining in Public Employment*, in *Collective Bargaining in the Public Service: Theory and Practice* (K. Warner ed. 1967).

26. See Heimbach, Pragan, Remus, *Panel Discussion: Is Private Sector Industrial Relations the Objective in the Federal Service?*, in *Collective Bargaining in the Public Service*, I.R.R.A. Proceedings 1966 Annual Spring Meeting (H. Somers ed.).

27. See, e.g., Gregory, *Introduction to Symposium on Labour Union Power and the Public Interest*, 35 *Notre Dame Law* 592 (1960): "Surely we can all agree that government employees cannot be allowed to strike." *Id.* at 593.

28. See Herman, *Collective Bargaining by Civil Servants in Canada*, *supra* note 26.

29. Trade Union Act, [1944] Sask. Stat. c. 69, § 2(6), consolidated in Sask. Rev. Stat. c. 287, § 1(f) (1965).

30. [1966-67] Can. Stat. c. 71 (1966).

31. Que. Rev. Stat. c. 141 (1964), as amended, [1965] Que. Stat. c. 50.

relating to "employees of a public service."³² Included in this category are both employees of the provincial government, and employees of a variety of municipal, charitable and educational institutions, public utilities, and other governmental and quasi-governmental bodies.³³ For such employees, the right to strike is maintained except to the extent that "a threatened or actual strike in a public service endangers the public health or safety . . . or interferes with the education of a group of students,"³⁴ in which case the strike may be postponed. The Quebec Civil Service Act,³⁵ complementing the Labour Code, places upon unions representing employees of the provincial government the obligation to make arrangements for the maintenance of "essential services," as a condition precedent to the right to strike. Power is also vested in a court to enjoin a strike of public service employees, pending investigation by a fact-finding tribunal which has no power to make recommendations.³⁶

The brief experience since Quebec public service employees acquired the right to strike in January, 1966,³⁷ has been traumatic. A prolonged strike of teachers was ended only by special legislation,³⁸ and a rotating strike by employees of the provincially-owned hydro-electric system lasted for some weeks before the threat of legislation forced a settlement. Perhaps most dramatic have been the strikes of hospital employees and nurses in defiance of an injunction postponing strike action until adequate arrangements had been made for the preservation of emergency services. However, this militancy in Quebec may be attributable to the convergence of three unique influences: the revocation of a statute³⁹ which for over twenty years had inhibited the bargaining activities of the public employees, the outpouring of resentment after decades of frustration, and the spirit of Quebec's "quiet revolution," transposed from the political to the economic sphere.

To what extent the right to strike in public employment will survive its actual exercise is a matter of conjecture. Even though the Hydro Quebec strike alone involved provincial government employees, even though the province survived the unthinkable—strikes in hospitals, schools, and public utilities—the political pressure for anti-strike legislation will likely be too strong to ignore.

Part of the weakness of the Quebec statute is that controversies over the essentiality of the struck service are conducted while the strike is in progress. Accusations of reckless disregard for the public can therefore be made by the government, while its attempts to forestall real or imagined emergencies through injunctive action are politically risky because they smack of retroactivity. The

32. *Id.* § 99.

33. *Id.* § 1(n). See also Civil Service Act, [1965] Que. Stat. c. 14, §§ 68-75.

34. Lab. Code, Que. Rev. Stat. c. 141, § 99 (1964).

35. [1965] Que. Stat. c. 14, § 75.

36. Lab. Code, Que. Rev. Stat. c. 141, § 99 (1964).

37. The Civil Service Act, [1965] Que. Stat. c. 14, § 75 suspended the right to strike until January 31, 1966.

38. An Act to Insure for Children the Right to Education and to Institute a New Schooling Collective Agreement Plan, [1967] Que. Stat. bill 25.

39. Public Service Employees Disputes Act, Que. Rev. Stat. c. 169 (1941).

federal Public Service Staff Relations Act provides a sounder method of preventing emergencies while preserving the general right to strike. Upon obtaining bargaining rights for federal public servants, a union is entitled to elect whether it wishes to have future collective bargaining disputes settled by arbitration or by a process of conciliation and, impliedly, by a strike.⁴⁰ In the event that the union selects the former alternative, no problems of emergency strikes can obviously arise. However, in those bargaining units where a union chooses the strike option, the Public Service Staff Relations Board, an impartial administrative tribunal, must designate prior to conciliation, those employees or classes of employees "whose duties consist in whole or in part of duties the performance of which . . . is or will be necessary in the interest of the safety or security of the public."⁴¹ No employee who is so designated is permitted to strike.⁴²

A third reaction to strikes by government employees in critical jobs is that of Saskatchewan which, until 1966, had eschewed any legislation to maintain even essential services. However, in that year a strike by employees of the Saskatchewan Power Corporation, the publicly-owned electrical distribution system, was terminated by the passage of the Essential Services Emergency Act.⁴³ While framed in terms of general and future application, the statute was passed at a special legislative session called for the purpose, and was invoked immediately. It required employees to terminate the strike and report for work, and reinforced this obligation by a threat to revoke the union's bargaining rights if it continued the strike, or failed, in the government's opinion, "to do everything reasonably possible to end the strike."⁴⁴ Moreover, while the statute submitted the dispute to arbitration, the validity of the arbitral award was made conditional upon the termination of the strike. With the passage of this statute, Saskatchewan joined the ranks of those provinces which make special legislative provision for the maintenance of essential services. The Saskatchewan statute, however, does not treat public servants differently from persons in private employment in respect to the obligations imposed. All persons involved in a strike in public utilities or hospitals which creates "a state of emergency" are covered by the statute.

The conclusion that appears from the Quebec, federal, and Saskatchewan statutes is that public employment in Canada does not necessarily transform all strikes into emergencies or situations of particular public interest. Rather, the test is the effect of the strike upon essential interests of the community. While in Saskatchewan the cabinet⁴⁵ is made the judge of actual or threatened harm to public health or safety, under both the federal and Quebec statutes, this task of adjudication is committed to an impartial body: in the former case

40. Public Service Staff Relations Act, [1967] Can. Stat. c. 71 §§ 36, 59.

41. *Id.* § 79.

42. *Id.* § 101(1)(c).

43. [1966-67] Sask. Stat. c. 2 (1966).

44. *Id.* § 10(1)(a).

45. *Id.* § 3.

the Public Service Staff Relations Board⁴⁶ and in the latter the Labour Relations Board.⁴⁷

B. *Defining and Confining the Concept of a Public Interest Dispute*

If "public interest" disputes are not to be equated with disputes in "public employment," what are their true dimensions? Theoretically, it should be possible to create a scale for measuring the degree to which the public interest is present in a given dispute.⁴⁸ However, the public interest cannot be measured in purely quantitative terms. On the one hand, disputes in large corporations may involve the participants, their customers and suppliers, in heavy economic costs, yet these disputes may be qualitatively indistinguishable from disputes in any ordinary small firm. Unless sheer size makes a private dispute public, non-monetary factors must also be considered. On the other hand, while life, health and physical safety are obviously matters of public concern, the mere incantation of such phrases does not conjure up an accurate assessment of whether a particular dispute should be treated in a special way because of its "public" characteristics. For example, a railway strike causes losses which are primarily economic, but for some isolated communities there may be the more serious perils of food shortages or the unavailability of medical services formerly procured from a neighboring town. Should its predominate economic character or its incidental effect on human life determine the way in which the dispute should be handled? Again, a strike of hospital employees may create a risk of harm to patients, but this risk can be minimized if emergency services are provided or if alternate hospital facilities are available nearby. How much of a risk is the community prepared to accept?

Thus, the possibility of identifying public interest disputes by reference to a theoretical model is something less than fruitful. At least for the purpose of assessing the Canadian experience to date, it is actual events rather than abstractions which must be relied upon to identify areas of labor relations which are particularly affected by the public interest. Special legislative or executive action, beyond the normal conciliation function, is at least *prima facie* evidence that a dispute, or class of disputes, has unusual importance to the public requiring unusual measures to avoid or terminate the disruption of service.

Several *caveats* must at once be lodged against this method of defining public interest disputes. First, it cannot be assumed that legislators and administrators are infallible in their estimation of the impact of a strike upon the public. To cite but two examples: During the 1950 steel strike in the United States, President Truman justified his seizure of the steel companies on the ground that interruption of steel production would imperil the nation's prosecu-

46. Public Service Staff Relations Act, [1967] Can. Stat. c. 71, § 79.

47. Civil Service Act, [1965] Que. Stat. c. 14, § 75.

48. See, e.g., N. Chamberlain & J. Schilling, *The Impact of Strikes: Their Social and Economic Costs* (1954).

tion of the Korean War; the seizure was declared unconstitutional; the strike lasted fifty-five days; the war effort was virtually unaffected.⁴⁹ In Quebec, in 1965, a strike of fourteen captains and mates led to the interruption of a local ferry service between Quebec City and Levis, a small community across the St. Lawrence river. Although the ferry operated in the shadow of a large modern bridge, the situation was deemed an emergency, and a special statute was passed authorizing the government to seize the operation and to re-establish service.⁵⁰ At opposite extremes of the spectrum, these two situations illustrate the real dangers of relying upon the judgments of legislators or administrators as to when the public interest is imperiled. Second, even allowing for *bona fide* errors of judgment, political pressures may preclude intervention when it is needed or provoke it when it is not. Third, government officials so regularly intervene to assist the parties in reaching a settlement that the legal limits of the compulsory conciliation procedure are no longer its *de facto* limits. In hundreds of disputes, the Department of Labour will use its good offices to end strikes even though the parties have exhausted the formal dispute settlement procedures. Yet if each such case of "special" concern were taken to be a public interest dispute, the term would lose its meaning. It is only formal legislation or executive intervention of a particularly forceful type that can be regarded as symptomatic of a special public interest.

Keeping in mind these serious definitional problems, when has a special public interest been perceived to exist in Canadian labor disputes?

There is almost uniform tendency to treat policemen⁵¹ and firemen⁵² in a special way, and a plurality of the provinces make a special arrangements to prevent interruption of public utility services.⁵³ Increasingly in recent years labor disputes in hospitals have been the subject of special legislation,⁵⁴ as have

49. See H. Northrup, *Compulsory Arbitration and Government Intervention in Labour Disputes* 126 (1966).

50. Transportation Board Act, Que. Rev. Stat. c. 228 (1964), *as amended*, [1965] Que. Stat. bill 1.

51. The Police Act, Alta. Rev. Stat. c. 236, §§ 24-30 (1955), *as amended*, [1956] Alta. Stat. c. 41; Municipal Act, B.C. Rev. Stat. c. 255, § 194 (1960); Labour Relations Act, Man. Rev. Stat. c. 132, § 21(2) (1954); The Police Act, Ont. Rev. Stat. c. 298, §§ 26-35 (1960); Industrial Relations Act, [1962] P.E.I. Stat. c. 18, § 44; Lab. Code, Que. Rev. Stat. c. 141, §§ 82, 93, 142 (1964); City Act, Sask. Rev. Stat. c. 147, § 104 (1965).

52. Fire Departments Platoon Act, Alta. Rev. Stat. c. 114, § 14 (1955); Municipal Act, B.C. Rev. Stat. c. 255, § 194 (1960); Fire Departments Arbitration Act, [1954] Man. Stat. c. 8, §§ 6, 8; Fire Departments Act, Ont. Rev. Stat. c. 145, §§ 6, 7 (1960); Industrial Relations Act, [1962] P.E.I. Stat. c. 18, § 44; Lab. Code, Que. Rev. Stat. c. 141, §§ 82, 93 (1964); Fire Departments Platoon Act, Sask. Rev. Stat. c. 173, § 10 (1965).

53. B.C. Hydro & Power Authority Act, [1964] B.C. Stat. c. 7; The Alberta Labour Act, Alta. Rev. Stat. c. 167, § 99 (1955), *as amended*, [1960] Alta. Stat. c. 54; Labour Relations Act, Man. Rev. Stat. c. 132, § 78 (1954), *as amended*, [1958] Man. Stat. c. 29; Industrial Relations Act, [1962] P.E.I. Stat. c. 18, § 42; Essential Services Emergency Act, [1966-67] Sask. Stat. c. 2 (1966); Trade Union Act, N.S. Rev. Stat. c. 295, § 68(2) (1954), *as amended*, [1965] N.S. Stat. c. 53; Toronto Hydro-Employees' Union Dispute Act, [1965] Ont. Stat. c. 131, §§ 3, 4, 6; Ontario Hydro-Employees' Union Dispute Act, [1961-62] Ont. Stat. c. 94, §§ 2, 3, 5 (1962).

54. Hospital Employees (Employment) Act, [1966-67] Newf. Stat. c. 11 (1966); Hospital Labour Disputes Arbitration Act, [1965] Ont. Stat. c. 48; The Alberta Labour

strikes involving railways,⁵⁵ shipping⁵⁶ and ferry services.⁵⁷ Rounding out the list of "public interest" situations, at least as evidenced by legislative intervention, are teachers⁵⁸ and government employees⁵⁹ (in some provinces) and—perhaps reflecting local economic and social idiosyncracies: loggers⁶⁰ and liquor store employees.⁶¹

The list is short, and it does not cut to the core of the labor force. Except for the loggers, whose violent strike was alleged to have jeopardized the basic economy of the province of Newfoundland, all of these groups of employees were involved in industries which were publicly-owned or subsidized, or which enjoyed a publicly-granted monopoly. Moreover, with the added possible exception of liquor stores, the services provided actually were related to the physical health and safety of the community, or to the maintenance of communications. Arguably, the flow of persons and goods by rail should not be distinguished from their transportation by air, water or truck, but perhaps the special facts of Canada's geography and economy warrant the special concern which has been shown for railway labor disputes.⁶² Of this, more below.

Apart from formal legislative recognition of a "public interest" factor in certain disputes, there have been a number of recent cases in which dramatic executive action, similarly motivated, has forestalled or ended a strike. Several of these cases involved industries already mentioned—railways,⁶³ hospitals,⁶⁴

Act, Alta. Rev. Stat. c. 167, § 99 (1955), *as amended*, [1960] Alta. Stat. c. 54; Essential Services Emergency Act, [1966-67] Sask. Stat. c. 2, §§ 4, 7 (1966).

55. Maintenance of Railway Operation Act, [1966] Can. Stat. bill C-230; Railway Operation Continuation Act, [1960-61] Can. Stat. c. 2 (1960).

56. St. Lawrence Ports Working Conditions Act, [1966-67] Can. Stat. bill C-215 (1966); Maritime Transportation Unions Trustees Act, [1963] Can. Stat. c. 17.

57. British Columbia Coast Steamship Service Act, [1958] Can. Stat. c. 7; Transportation Board Act, Que. Rev. Stat. c. 228 (1964), *as amended*, [1965] Que. Stat. bill 1.

58. Public Schools Act, B.C. Rev. Stat. c. 319, § 140 (1960) *as amended*, [1965] B.C. Stat. c. 41; Public Schools Act, Man. Rev. Stat. c. 215, § 379(b) (1954), *as amended*, [1956] Man. Stat. c. 53; An Act to Insure to Children the Right to Education and to Institute a New Schooling Collective Agreement Plan, [1967] Que. Stat. bill 25.

59. Public Service Act, Alta. Rev. Stat. c. 263, §§ 56-60 (1955), *as amended* [1965] Alta. Stat. c. 75; Constitution Act, [1959] B.C. Stat. c. 17; Public Service Staff Relations Act, [1967] Can. Stat. c. 72; Civil Service Act, Man. Rev. Stat. c. 39, § 45(I) (1954), *as amended*, [1965] Man. Stat. c. 11; Civil Service Act, N.B. Rev. Stat. c. 29, § 52 (1952), *as amended*, [1964] N.B. Stat. c. 17; Public Service Act, Ont. Rev. Stat. c. 331, § 19 (1960), *as amended*, [1962-63] Ont. Stat. c. 118 (1963), and [1966] Ont. Stat. c. 130; Civil Service Act, [1965] Que. Stat. c. 14.

60. Trade Union (Emergency Provisions) Act, [1959] Newf. Stat. c. 2; Labour Relations (Amendment) Act, [1959] Newf. Stat. c. 1.

61. Labour Relations Act, Man. Rev. Stat. c. 132, § 78 (1954), *as amended*, [1958] Man. Stat. c. 29; Trade Union Act, N.S. Rev. Stat. c. 295, § 68(2) (1954), *as amended*, [1965] N.S. Stat. c. 53.

62. To an extent, the rate structure of the two major lines, and the public ownership of one of them, reflects a belief that the railway is an instrument of national policy, linking east and west, and underpinning the prosperity of the key wheat-growing areas on the prairies.

63. R. Kellock, Report of the Royal Commission on Employment of Firemen on Diesel Locomotives (Can. 1957); S. Freedman, Report on Industrial Commission Relating to C.N.R. Run-Throughs (Can. 1965).

64. C. E. Bennett, Report on Royal Commission on Compulsory Arbitration in Disputes Affecting Hospitals and Their Employees (Ont. 1964).

and shipping;⁶⁵ but the list might be extended to include longshoremen,⁶⁶ and postal employees.⁶⁷ In each case, a royal commission, or less formal industrial inquiry commission, was appointed to investigate the dispute, although not necessarily empowered to settle it.

Beyond this point, documentation becomes difficult, and the line between significant and merely routine intervention blurs. In a number of transportation disputes; *e.g.*, in airlines, long-distance trucking and local transit systems, active and intensive mediation has been reinforced by veiled or blatant threats of special legislation to end the strike. Major strikes in a Manitoba packinghouse and in the west coast fishing industry led to the appointment, respectively, of a royal commission⁶⁸ and a federal-provincial committee of inquiry⁶⁹ as part of a long-term exercise in peace-keeping. Violence and community disruption probably account for the special concern of government in strikes of dump-truck operators and construction workers in Toronto, both of which also gave birth to well-known royal commissions.⁷⁰ Indeed, royal commissions and industrial inquiries have been so frequently used as a means of "cooling-off" bitter strikes, that their appointment is of diminishing significance as an accurate benchmark of the public interest. Finally, if high-level official intervention in the bargaining process is *per se* a sign of public interest in a dispute, there is hardly an industry which has escaped the distinction of community concern: newspapers, hotels, television broadcasting, steel manufacturing and oil refining, textile mills and furniture factories, racetracks and breweries; all of these, and others, in recent years have been deemed worthy of ministerial intervention.

The conclusion is inescapable: in the Canadian tradition, all disputes are public interest disputes to a greater or lesser degree. The turn-of-the-century policy of compulsory conciliation established this, and the contemporary passion for informal intervention, fact-finding and legislative regulation serves to underline it. Thus, Canadian labor relations policy is ambivalent, if not schizophrenic.

65. On July 17, 1962, T.G. Norris, J., was appointed as the Industrial Inquiry Comm'n on the Disruption of Shipping, following a thirty-hour disruption of shipping along the St. Lawrence River on July 5 and 6. *See infra* note 105.

66. In August, 1966, Mr. L.A. Picard was appointed as an Industrial Inquiry Comm'n to investigate certain matters connected with the settlement of a dispute affecting longshoremen in the ports of Montreal, Trois-Rivières and Quebec. Under the provisions of the St. Lawrence Ports Working Conditions Act, [1966-67] Can. Stat. bill C-215 (1966), his recommendations were made binding on all parties.

67. J.C. Anderson, J., was appointed as an Industrial Inquiry Comm'n to inquire into salaries during the seventeen-day postal strike in 1965. Following a return to work by all the strikers except those in Montreal, a nation-wide referendum among the postal workers accepted Judge Anderson's recommendations. In a subsequent vote, taken separately, the Montreal workers also adopted the recommendations. 65 Lab. Gaz. 789 (1965).

68. G. E. Tritschler, Report of the Brandon Packers Strike Commission. (Man. 1961).

69. Federal-Provincial Committee Report on Wage and Price Disputes in the British Columbia Fishing Industry (1964).

70. W. D. Roach, Royal Commission Inquiry into Certain Activities of the International Brotherhood of Teamsters in Connection with Truckers Hauling Sand and Gravel in the Toronto-Hamilton Area (Ont. 1958); H. C. Goldenberg, Royal Commission on Labour-Management Relations in the Construction Industry (Ont. 1962).

A laissez-faire philosophy, borrowed from the Wagner Act, assumes that collective bargaining and sweet reason will conquer all. But when serious conflict occasionally breaks out, the policy of allowing the parties to settle their differences is petulantly repudiated, and government returns to its historic pursuit of that holy grail—industrial peace.

This pattern has a dynamic of its own which further complicates the task of defining public interest disputes. Each interventionist episode is used as a precedent to justify further intervention: if railroaders labor in the public interest, why not longshoremen and seamen and workers in wheat storage facilities? If the production of electric power is essential to the community, why not its distribution, or the production and distribution of natural gas or petroleum products? If the uninterrupted flow of goods is a matter of public concern, why not the uninterrupted flow of news and advertising on radio and television and in the daily newspapers?

This amoeba-like tendency of public interest disputes to reproduce themselves is clearly evident in the railways. In the early 1900's, when railways were the only effective means of communication linking the new Canadian west with the eastern centers of commerce and government, a railway strike could literally paralyze the country. In response to several such traumatic strikes, legislation was passed in 1903⁷¹ and 1906⁷² which, as has been seen, introduced the concepts of compulsory conciliation and the postponement of strikes. Wartime emergencies apart, this relatively mild form of intervention prevailed until 1950, throughout the years when highway transport developed to the point where it could provide efficient regional service, and air lines began to carry a significant proportion of passenger traffic. Yet despite the decreasing importance of railways over this half-century, in 1950 a more active period of intervention began with the passage of a federal statute⁷³ ending a strike of nonoperating employees on the two major railways, and submitting the issues to compulsory arbitration. In 1954, the same parties were confronted with the threat of similar legislation, and they "agreed" to submit to arbitration instead of resorting to economic conflict. In 1957, a strike of railway firemen occurred, the central issue being their future employment on diesels. Once again, government intervention terminated the strike: the merits of the work assignment issue were submitted to a royal commission for investigation.⁷⁴ Between 1950 and 1960, the relative importance of the railways to the national economy had declined even further, because of the opening of the St. Lawrence Seaway, the further expansion of trucking services, and the great increase in air transport, as well as its extension to many formerly isolated areas. Nonetheless, in 1960 an imminent strike of nonoperating employees was forestalled by the simple expedient

71. Railway Labour Disputes Act, [1903] Can. Stat. c. 55.

72. Conciliation and Labour Act, [1906] Can. Stat. c. 96.

73. Maintenance of Railway Operations Act, [1950-51] Can. Stat. c. 1 (1950).

74. R. Kellock, *supra* note 63.

of legislation which extended the duration of the expiring collective agreements,⁷⁵ (under Canadian law, all strikes during the term of a collective agreement are illegal).⁷⁶ The parties were able to negotiate a settlement prior to the new strike deadline thus established. In 1964, maintenance employees engaged in a wild-cat strike were persuaded to return to work by the promise of the appointment of a royal commission to investigate their protest against threatened layoffs.⁷⁷ Most recently, in 1966 a major strike of both nonoperating employees and running trades was ended after about one week by *ad hoc* legislation submitting the issues to mediation and, ultimately, to arbitration.⁷⁸

Thus, while railways disputes are, if anything, less crucial to the public interest today than they were in the 1900's, the public is becoming more intensely preoccupied with avoiding any disruption of service. Experience since the strike-ending statute of 1950 shows that special executive or legislative action is an almost certain substitute for economic action if collective bargaining breaks down. Knowledge of this certainty has become part of the tactical calculus of the parties, and they in turn help to make intervention more certain by a refusal to settle until it occurs.

In summary, an initial decision that a particular industry affects the public interest tends to be self-confirming. Intervention becomes a way of life: the very fact of past intervention is presented as evidence that the public interest is involved, and can only be protected by further intervention.

Certain institutional arrangements operate to inhibit this tendency, and to create a buffer against the pressure of public opinion favoring intervention, whether spontaneously generated or artfully manipulated by one of the disputing parties. First, in practice the initiative exercised by the executive in the Canadian parliamentary system is probably less than under the American system, although by definition Canadian cabinets enjoy majority support in the legislature. There is, therefore, a general reluctance on the part of the government to utilize its inherent emergency powers to justify intervention in a labor dispute—this has been done only twice in the postwar period⁷⁹—or to

75. Railway Operation Continuation Act, [1960-61] Can. Stat. c. 2 (1960).

76. Industrial Relations and Disputes Investigation Act, Can. Rev. Stat. c. 152, § 22 (1952).

77. See Freedman, *supra* note 63.

78. Maintenance of Railway Operation Act, [1966] Can. Stat. bill C-230.

79. In 1958, the government of British Columbia invoked the Civil Defense Act, B.C. Rev. Stat. c. 55 (1960), to prevent a strike on a coastal ferry serving a number of otherwise isolated communities. Any challenge to the dubious legality of this action was forestalled by the passage of federal legislation, the British Columbia Coast Steamship Service Act, [1958] Can. Stat. c. 7, which ordered the employees to remain to work and appointed an administrator to carry on the operation of the ferry service. In 1966, the Prince Edward Island Emergency Measures Act, [1959] P.E.I. Stat. c. 4, *as amended*, [1966] P.E.I. Stat. c. 3, was invoked in an attempt to end a strike of workers on a ferry connecting the province with the mainland. The ferry was owned by the Canadian Nat'l Ry., and had ceased operation as a result of the 1966 railway strike. The provincial intervention had the effect of securing the withdrawal of pickets and of permitting a partial restoration of service. Soon afterwards, the strike itself was terminated by the passage of a federal statute, the Maintenance of Railway Operation Act, [1966] Can. Stat. bill C-230.

accept an open-ended mandate to deal with labor disputes affecting the public interest, without a careful specification of procedures and objectives.⁸⁰ Also, the legality of executive action not clearly sanctioned by statute is likely to be challenged in the courts. To the extent, then, that forceful executive action is dependent on an authorizing statute, the absence of such a statute is a deterrent to impetuosity.

It follows that a second consideration which militates against too-frequent and too-hasty intervention is the slowness of the legislative machinery. Unless the union is obliging enough to strike while the legislature is sitting, it must be summoned and its cumbersome rites observed.⁸¹ If there is political capital to be made from harassing the government, or from delaying the passage of legislation, the opposition is presented with a golden opportunity. Equally, a government reluctant to intervene can plead that its hands are tied by the absence of existing legislation and the difficulties of passing new legislation. Finally, on this point, a government which brings in legislation to settle a dispute which is already under way is open to two charges, both of which may damage it politically: critics of the government may condemn it for allowing the situation to degenerate to the point where special measures are needed, and the parties to the dispute can protest that "the rules have been changed in the middle of the game." All of these factors must give pause to any government considering emergency legislation to meet a particular crisis.

Paradoxically, the very existence of fixed and specific procedures for the settlement of public interest disputes tends to operate in the same way as the absence of such procedures, to insulate the government against demands for improvised, *ad hoc* intervention. Where legislation has already been passed which deals with disputes in a particular way, to the extent that it is effective, it will alleviate the pressure for further intervention. As well, to superimpose special procedures upon standing procedures in a particular case would appear to be especially unfair.

Yet, as Canadian experience over the past twenty years has shown, the trend has been towards intervention, and thus towards a broader operative definition of the public interest dispute. The institutional constraints have proved to be less powerful than the political pressures in favor of intervention. On the assumption that the public interest dispute is a permanent, and probably grow-

80. *But see* Alberta Labour Act, Alta. Rev. Stat. c. 167, § 99 (1955), *as amended*, [1959] Alta. Stat. c. 54, § 32, which empowers the provincial cabinet, by proclamation, to declare that a labor dispute in a public utility or hospital has created an emergency affecting life or property. When such a proclamation has been made, strikes or lockouts become illegal, and the Minister of Labour is empowered "to do all such things as may be necessary to settle the dispute." *Id.* This provision has never been invoked.

81. *E.g.*, in 1966 the federal government was prevented from introducing legislation to end a strike of longshoremen in British Columbia by the refusal of a single member, M. G. Gregoire, a self-styled Quebec separatist, to consent to a motion to suspend the rules of the House of Commons, the unanimous consent of the House being required in such a case.

ing, feature of Canadian industrial relations, we must next turn to a closer analysis of the techniques by which these disputes have been settled.

C. *Experiments in Peace-keeping*

The general pattern of Canadian labor relations legislation, as has been noted, is to superimpose upon the process of collective bargaining an obligation to resort to conciliation. Until conciliation procedures have been exhausted, in most jurisdictions, there can be neither strikes nor lockouts.⁸² This legislation applies to public interest disputes as to all others except to the extent that special statutes substitute a different arrangement. Indeed, the public interest dispute was the archetypical situation in which Canadian legislation was designed to operate. To this extent, then, public interest disputes are regularly the subject of peace-keeping efforts. However, conciliation in public interest disputes does have certain special characteristics.

In its pristine form,⁸³ the conciliation process generally operated in two stages. A conciliation officer, employed by the Department of Labour, would meet with the parties and attempt to persuade them to settle their differences. If he failed to secure a settlement, he would so advise the Minister of Labour who was empowered to, and almost invariably did, establish a tripartite board of conciliation. The board was armed with sweeping powers to compel the production of documents and the giving of evidence,⁸⁴ and tended to follow court-like procedures. But its ostensible function was to secure compromise. If peace-keeping efforts failed, the board would report to the Minister and recommend appropriate terms of settlement.⁸⁵ This report, implicitly or explicitly, would identify the party whose unreasonableness, presumably, had frustrated agreement. Public opinion could then be mobilized in favor of the board's proposals, and pressure would mount for settlement on the terms recommended. The board thus was designed to perform a normative function, in effect nonbinding adjudication, which was often inconsistent with its peace-keeping mission.

The inconsistency of these two roles is easily illustrated. An important technique of peace-keeping is to avoid confrontation; by keeping the parties apart, and in ignorance of each other's position, a skilled conciliator may gradually per-

82. See statutes compiled in *supra* note 23. See also Alberta Labour Act, Alta. Rev. Stat. c. 167, § 94 (1955), as amended, [1964] Alta. Stat. c. 41; Labour Relations Act, N.B. Rev. Stat. c. 124, § 20 (1952); Labour Relations Act, Newf. Rev. Stat. c. 258, § 22 (1952); Trade Union Act, N.S. Rev. Stat. c. 295, § 21 (1954), as amended, [1964] N.S. Stat. c. 48; Industrial Relations Act, [1962] P.E.I. Stat. c. 18, § 38.

83. W. Cunningham, *Compulsory Conciliation and Collective Bargaining, The New Brunswick Experience* (1958); Herbert, *Conciliation Boards in British Columbia*, 3 Curr. Law & Soc. Prob. 130 (1963); Kovacs, *Compulsory Conciliation in Canada*, 10 Lab. L.J. 100 (1959); Levinson, *Compulsory Conciliation Machinery in Ontario*, 1 Osgoode Hall L.J. 47 (1958); Taylor, *Conciliation*, in [1954] Spec. Lect. Law Soc. Upper Can. 113; see also Phillips, *Government Conciliation in Labour Dispute*, 22 Can. J. Econ. & Pol. Sci. 523 (1956); Woods, *Canadian Collective Bargaining and Dispute Settlement Policy: An Appraisal*, 21 Can. J. Econ. & Pol. Sci. 447 (1955).

84. Industrial Disputes Investigation Act, [1907] Can. Stat. c. 20, § 30.

85. *Id.* §§ 25, 26.

suade them to move towards a common ground. However, adversary-style proceedings have the effect of highlighting issues in dispute and of forcing the parties to articulate clearly opposing viewpoints. Similarly, a good conciliator who has not succeeded in bringing the parties together on all issues will wish to avoid doing anything which might inhibit compromise at a later date. Contrariwise, a conciliation report designed to secure adherence to recommended norms through the pressure of public opinion may freeze negotiating positions which were actually fluid, or may bolster the determination of the favored party to refuse further concessions, even though these might be useful and essential to a negotiated settlement. Finally, the norm-setting conciliator is operating under the twin handicaps that a particular set of contract terms is often rationally indefensible, although conducive to settlement, and that the public understands little and cares less about the controversy between the two parties to the dispute. A report, therefore, often did little to produce pressures for settlement, and sometimes actually served to exacerbate the situation.

In the 1950's and 1960's a subtle change has taken place in general Canadian conciliation techniques. Much more emphasis has come to be placed on the accommodative rather than the adjudicative functions of conciliators,⁸⁶ with the result that the use of the formal, tripartite board has declined.⁸⁷ With this decline came the eclipse of the board report as a technique of pressuring the parties to agree to a settlement. But, while this evolution generally helped to increase the effectiveness of conciliation, the special setting of public interest disputes tended to preserve old-style normative conciliation in this area of conflict.

While it is generally conceded that the postponement of conflict is not *per se* conducive to settlement, in public interest disputes no government wishes to expose itself to the charge that it failed to do everything within its power to keep the peace. Therefore, while conciliation is being used more selectively throughout the economy, it is virtually automatic in public interest disputes; too frequent use may undermine the efficacy of even the best-designed system. Second, it has long been observed that when conciliation is automatic, direct bargaining tends to become a mere rehearsal for it, especially since a norm-fixing report is so often framed as a compromise between two apparently irreconcilable positions. Similarly, since post-conciliation government intervention, whether by informal mediation or formal arbitration, has become a regular feature of

86. Levinson, *supra* note 83, at 53. *But see* Herbert, *supra* note 83.

87. Quebec no longer provides for the appointment of boards of conciliation, although it still requires the appointment of a conciliation officer on application of either party. Lab. Code, Que. Rev. Stat. c. 141, § 43 (1964). Other provinces permit the parties to choose either a one-step or a two-step conciliation procedure. *See, e.g.*, Labour Relations Act, Ont. Rev. Stat. c. 202, § 14 (1960), *as amended*, [1964] Ont. Stat. c. 53; Man. Rev. Stat. c. 132, § 16(4) (1954), *as amended*, [1962] Man. Stat. c. 35. In some provinces, the the Minister is given considerable discretion as to the establishment of a conciliation board, and increasingly is declining to appoint such boards. *See, e.g.*, Labour Relations Act, Ont. Rev. Stat. c. 202, § 16(b) (1960); Man. Rev. Stat. c. 132, § 17 (1954); Trade Union Act, Sask. Rev. Stat. c. 287, § 21 (1965).

Canadian public interest disputes, conciliation itself has tended to become a prelude to such intervention, rather than a fruitful search for compromise. Third, while the public is uninformed and unconcerned about the mill-run of disputes, a work stoppage in transportation, communications, or public utilities immediately engages the attention and concern of the whole community. Even conceding the limits within which the community can pressure either of the parties, a conciliation report may come closer to serving its original function of mobilizing public opinion in these situations than in the generality of cases. Finally, where the industry or service affected is a private or public monopoly, any wage increase is almost sure to generate pressures for price or rate increases, or for tax subsidies. The public therefore has a more direct and easily identifiable interest in the substantive terms of any bargain, and will naturally wish to measure the position of the parties against the yardstick of a conciliation board report.

All of these factors operating in the public interest dispute tend to maximize the formality of the conciliation board's proceedings and its report and thus, if general experience is any criterion, to minimize its effectiveness in avoiding strikes. Since conflict tends not to be resolved through the regular conciliation procedures, there are obviously strong temptations to invoke special measures rather than accept the consequences of a work stoppage.

Informal mediation by senior government officials is the most common post-conciliation step, and the one closest to the mainstream of collective bargaining. At a minimum, the prestige of the mediator may be used to gain the confidence of the parties, and to give new momentum to settlement discussions. Beyond this, a recalcitrant union may be persuaded to sign an agreement by a promise to investigate its just complaints,⁸⁸ or an employer by the promise of a subsidy or rate increase.⁸⁹ If persuasion fails, threats may prevail—threats to impose a solution by law,⁹⁰ or to seize the enterprise.⁹¹ These mediation efforts, conducted with varying degrees of subtlety and sophistication, undoubtedly produce many settlements. However, as with conciliation itself, promiscuous peace-keeping efforts at the highest level tend ultimately to be self-defeating. The prestige of a cabinet-level mediator which should be a catalyst to negotiation is often diluted by his pursuit of the political advantages of having “sold” a settlement; threats and promises, if not fulfilled, tend thereafter to become less credible.

88. In 1956, a strike of railway firemen was avoided by the appointment of a royal commission to investigate their future use on diesel trains. See R. Kellock, *supra* note 63. In 1966, a longshoremen's strike was brought to a halt by the government's promise to investigate complaints of bad working conditions; as part of the settlement, in effect, the St. Lawrence Ports Working Conditions Act, [1966-67] Can. Stat. bill C-215 (1966), was passed, establishing acceptable minimum guarantees for the men.

89. *E.g.*, in 1956, the railways were permitted to increase freight rates to cover an additional wage burden incurred as the result of concessions made under government pressure.

90. This occurred during the railway negotiations of 1954, the Air Canada strike of 1966, and the Quebec Hydro strike of 1967.

91. Seizure occurred during the 1958 strike of coastal ferries in British Columbia, and during a 1966 strike of Quebec hospital workers.

Some few attempts have been made to institutionalize high-level mediation. In Nova Scotia, for example, employees of the provincial power and liquor commissions are permitted to strike, but their right to do so is postponed for a thirty-day period following conciliation,⁹² presumably to permit further mediation efforts. In Prince Edward Island, following conciliation, parties to a labor dispute affecting a public utility must submit to a formal hearing by the Public Utilities Commission; strikes are postponed until fifteen days after the issuance of its non-binding report.⁹³ Quebec legislation provides for postponement of strikes which may endanger the public health or safety, for up to eighty days pending fact-finding by an *ad hoc* board of inquiry.⁹⁴

Special legislation has been passed on occasion to extend the term of an expired collective agreement and thus to create a period within which negotiation, and presumably mediation, might be resumed. In 1960, a federal statute ordered railway strikers to return to work, and postponed the resumption of the strike for a period of six months.⁹⁵ While no formal settlement mechanism was created and the parties succeeded in reaching an agreement during this period, it is obvious that the threat of an imposed solution must have been in the minds of the negotiators. Similarly, a Newfoundland statute⁹⁶ in 1967 peremptorily ended a strike of hospital workers, but created no mechanism for the resolution of the dispute beyond an informal promise of arbitration should negotiation prove fruitless. A 1967 Quebec statute⁹⁷ was much more elaborate. It ended a prolonged teacher's strike, revived a number of collective agreements which had expired, extended their duration for approximately one year, and specified wage increases to be paid by the school board-employers. Also specific provision was made for province-wide negotiation of the next, and all succeeding, collective agreements, in aid of which a special fact-finding body was to be established. The coercive power of the state, merely hinted at in the passage of the 1960 federal railway legislation, is unmistakably announced in the Quebec statute. Future wage disputes may be submitted to binding arbitration by either party or by the Ministry of Labour.

The Quebec statute represents the convergence of two techniques by which peace-keeping has been translated from an exercise in persuasion into a commitment to compulsion. It illustrates both the direct control by the government over the conduct of one party to a public interest dispute, and the creation of an obligation to resort to a specified method of dispute settlement other than the strike.

92. Trade Union Act, N.S. Rev. Stat. c. 295, § 68(2) (1954), *as amended*, [1965] N.S. Stat. c. 53.

93. Industrial Relations Act, [1962] P.E.I. Stat. c. 18, § 42, *as amended*, [1966] P.E.I. Stat. c. 19.

94. Lab. Code, [1964] Que. Rev. Stat. c. 141, § 99 (1964), *as amended*, [1965] Que. Stat. c. 50.

95. Railway Operation Continuation Act, [1960-61] Can. Stat. c. 2 (1960).

96. Hospital Employees (Employment) Act, [1966-67] Newf. Stat. c. 11 (1966).

97. An Act to Insure to Children the Right to Education and to Institute a New Schooling Collective Agreement Plan, [1965] Que. Stat. bill 25.

The technique of seizure, familiar in a variety of American state statutes,⁹⁸ has seldom been employed in Canada. Strictly speaking, of course, the Quebec school legislation did not remove control of the schools from local boards of education, but in fact they were required to grant the increases provided in the statute, and their autonomy as negotiating bodies was clearly ended. Henceforth, the provincial government can be expected to exercise a decisive influence in teacher negotiations. More clearly analogous to seizure in the familiar American sense were two other Quebec situations. In one, a government trustee was appointed to administer almost half of the province's hospitals, in order to end a three week strike;⁹⁹ a settlement was negotiated and the hospitals were then returned to local management. In the other, an administrator was appointed, under an amendment to the Transportation Board Act,¹⁰⁰ to assume control of a private ferry company and to settle a strike which had interrupted service. The only other instance in which seizure was employed was during a strike of seamen serving on a coastal ferry in British Columbia. Special federal legislation¹⁰¹ was passed providing an interim wage settlement and vesting control of the ferry line in a government-designated administrator who was empowered to operate it and to negotiate a settlement. The statute also provided for the resumption of collective bargaining and needlessly, as matters turned out, for compulsory arbitration.

If seizure of the enterprise is a technique familiar to American students of the public interest dispute, two Canadian statutes must be virtually unique in the annals of North American labor legislation. In both of these statutes, the government in effect "seized" the union rather than the employer. Newfoundland, in 1959, passed *ad hoc* legislation¹⁰² which dissolved two union locals in order to halt a bitter woods strike. Only in Newfoundland could a strike of loggers conceivably be termed an "emergency," but in terms of local political realities there can be no doubt that the domestic tranquility of the island province was shattered. The legislation was greeted with derision in the rest of the country, but it escaped constitutional challenge, served its purpose, and was in due course partially repealed.¹⁰³ Of greater significance was the 1963 federal legislation¹⁰⁴ imposing trusteeship on five unions representing seamen on the Great Lakes. The statute was designed to end the disruption of shipping which had been produced by inter-union rivalry, rooted in the labor movement's desire to "free" seamen from the allegedly corrupt Seafarers' International Union. This

98. Northrup & Rowan, *State Seizure in Public Interest Disputes*, in H. Northrup, *Compulsory Arbitration and Government Intervention in Labour Disputes* app. B (1966).

99. Hospitals Act, Que. Rev. Stat. c. 164, § 17 (1964).

100. Transportation Board Act, Que. Rev. Stat. c. 228 (1964), *as amended*, [1965] Que. Stat. bill 1.

101. British Columbia Coast Steamship Service Act, [1958] Can. Stat. c. 7.

102. Trade Union (Emergency Provisions) Act, [1959] Newf. Stat. c. 21; Labour Relations Act, Newf. Rev. Stat. c. 258 (1952), *as amended*, [1959] Newf. Stat. c. 1.

103. Labour Relations Act, Newf. Rev. Stat. c. 258 (1952), *as amended*, [1960] Newf. Stat. c. 58, *and* [1963] Newf. Stat. c. 82.

104. Maritime Transportation Unions Trustees Act, [1963] Can. Stat. c. 17.

disruption was the subject of an extensive inquiry,¹⁰⁵ fierce public debate, and behind-the-scenes negotiation in government and union circles. When all else failed, a board of three trustees assumed management of all unions operating on the Great Lakes, and principally the Seafarers'. After some four years of operation, the trustees seem to be about to relinquish control to presumably reformed, and duly elected, union officers.

It is a telling comment on the state of civil liberties in Canada that virtually no legal basis existed for challenging either statute on the grounds of interference with freedom of association.¹⁰⁶ However, viewed purely as an exercise in the expedient settlement of public interest disputes, "seizure" of the union can hardly be surpassed.

Turning next to the conventional methods of substituting some technique of dispute settlement for the strike as the terminal point in collective bargaining, there have been a few Canadian legislative experiments with "mediation to a finality"—to use a term popularized by the U.S. Secretary of Labor, W. Willard Wirtz. An early version of the Prince Edward Island legislation gave the Public Utilities Commission power to review the recommendations of a conciliation board report in any dispute involving a utility and to impose its recommendations upon the parties with or without change,¹⁰⁷ and in Manitoba, the Cabinet has the power to confirm or vary, and make binding, the award of a mediator in disputes affecting public utilities, the liquor commission, and provincial government employees.¹⁰⁸ Binding mediation is likewise provided in British Columbia to resolve collective bargaining impasses involving employees of the public hydro-electric system¹⁰⁹ and of municipal police and fire departments.¹¹⁰ Obviously, in each case "finality" is secured by a prohibition against strikes. Actual experience under these statutes has been negligible, and no published accounts exist of their use.

Choice-of-procedures legislation, widely advocated in the United States,¹¹¹ is represented on the Canadian statute books by one bizarre, but apparently moribund, enactment. An Alberta statute provides that "where at any time in the opinion of [the cabinet] a state of emergency exists . . . in such circum-

105. T. G. Norris, Report of the Industrial Inquiry Commission on the Disruption of Shipping (Can. 1963).

106. The constitutionality of the Maritime Transportation Unions Trustees Act was upheld in *Swait v. Trustees of the Maritime Transp. Unions*, [1967] Que. B.R. 315, 61 D.L.R.2d 317 (1966). But see D. Schmeiser, *Civil Liberties in Canada* 222 (1964).

107. Trade Union Act, P.E.I. Rev. Stat. c. 164, § 23 (1951), as amended, [1953-54] P.E.I. Stat. c. 3 (1953), repealed by Industrial Relations Act, [1962] P.E.I. Stat. c. 18, § 58.

108. Civil Service Act, Man. Rev. Stat. c. 39 (1954), as amended, [1965] Man. Stat. c. 11.

109. British Columbia Hydro & Power Authority Act, [1964] B.C. Stat. c. 7, § 56.

110. Municipal Act, B.C. Rev. Stat. c. 255, § 194 (1960).

111. See S. Slichter, *The Challenge of Industrial Relations* ch. vi (1947); Wirtz, *The "Choice-of-Procedures" Approach to National Emergency Disputes*, in *Emergency Disputes and National Policy* (I. Bernstein, H. Enarson & R. Fleming eds. 1955); Cox, *The Uses and Abuses of Union Power*, 35 Notre Dame Law. 624 (1960); Horlacher, *A Political Science View of National Emergency Disputes*, 333 Annals 85 (1961); see also Comm. for Econ. Development, *The Public Interest in National Labour Policy* 94 (1961).

stances that life or property would be in serious jeopardy" by reason of a labor dispute affecting hospital or public utility employees, a proclamation may be issued which renders further strike action illegal, and authorizes the Minister of Labour to "forthwith establish a procedure to assist the parties to the dispute."¹¹² The breathtaking open-endedness of the statute may well have been a deterrent to its use, as the timing and method of intervention is left completely in the hands of the executive, and subjected to neither legislative prescription nor judicial review.

By far the most common substitute for the strike is arbitration. Parties to any collective bargaining relationship may, of course, voluntarily submit their negotiating disputes to third-party adjudication, but seldom do so.¹¹³ The two prominent exceptions to this aversion to arbitration are unions of policemen and firefighters whose constitutions frequently contain a no-strike pledge. Their self-denying ordinances are recognized in several provincial statutes¹¹⁴ which provide for binding arbitration only for those unions which are committed to a policy of settling disputes without stoppage of work.

Usually, however, provincial statutes provide for compulsory arbitration for police and fire department employees,¹¹⁵ and with increasing frequency for hospital¹¹⁶ and public utilities workers¹¹⁷ and teachers.¹¹⁸ As has been recounted, federal *ad hoc* legislation has twice compelled the arbitration of railway disputes,¹¹⁹ and the probabilities are great that future bargaining impasses on the railways, and perhaps the airlines, will be similarly resolved.

Of the provincial statutes, the most sophisticated is the Ontario Hospital Labour Disputes Arbitration Act,¹²⁰ which was passed following a Royal Com-

112. The Alberta Labour Act, Alta. Rev. Stat. c. 167, §§ 99(1), (3) (1955), *as amended*, [1960] Alta. Stat. c. 54.

113. A rare instance of this involved a newspaper bargaining unit. *See* Matter of the Ottawa Citizen, [1966] Ont. L.R.B. Mthly. Rep. 535 (Oct.).

114. City Act, Sask. Rev. Stat. c. 147, § 104 (1963); Fire Departments Platoon Act, Sask. Rev. Stat. c. 173, § 10 (1965); Fire Departments Arbitration Act, [1954] Man. Stat. c. 8, § 6.

115. Fire Departments Platoon Act, Alta. Rev. Stat. c. 114, § 14 (1955); The Police Act, Alta. Rev. Stat. c. 236, §§ 24-30 (1955), *as amended*, [1955-56] Alta. Stat. c. 41; Fire Departments Arbitration Act, [1954] Man. Stat. c. 8, § 6; The Police Act, Ont. Rev. Stat. c. 298, §§ 26-35 (1960); Fire Departments Act, Ont. Rev. Stat. c. 145, § 6 (1960); Industrial Relations Act, [1962] P.E.I. Stat. c. 18, § 44, *as amended*, [1966] P.E.I. Stat. c. 19; Lab.^l Code, Que. Rev. Stat. c. 141, § 82 (1964); City Act, Sask. Rev. Stat. c. 147, § 104 (1965); The Fire Departments Platoon Act, Sask. Rev. Stat. c. 173, § 10 (1965).

116. Hospital Labour Disputes Act, [1965] Ont. Stat. c. 48, §§ 5-7; Industrial Relations Arbitration Act, [1962] P.E.I. Stat. c. 18, § 44, *as amended*, [1966] P.E.I. Stat. c. 19; Essential Services Emergency Act, [1966] Sask. Stat. c. 2, § 4.

117. Toronto Hydro—Employees' Union Dispute Act, [1965] Ont. Stat. c. 131, §§ 3, 4; Ontario Hydro—Employees' Union Dispute Act, [1961-62] Ont. Stat. c. 94, §§ 2, 3 (1962); Essential Services Emergency Act, [1966] Sask. Stat. c. 2, § 4.

118. Public Schools Act, B.C. Rev. Stat. c. 319, § 140 (1960), *as amended*, [1965] B.C. Stat. c. 41; Public Schools Act, Man. Rev. Stat. c. 215, § 379(b) (1954), *as amended*, [1956] Man. Stat. c. 53; An Act to Insure to Children the Right to Education and to Institute a New Schooling Collective Agreement Plan, [1967] Que. Stat. bill 25.

119. Maintenance of Railway Operation Act, [1950-51] Can. Stat. c. 1, § 5 (1950); Maintenance of Railway Operation Act, [1966-67] Can. Stat. bill C-230, §§ 9, 10 (1966).

120. [1965] Ont. Stat. c. 48.

mission inquiry.¹²¹ During the public hearings held by the Royal Commission, a wide diversity of opinion was revealed on the desirability of compulsory arbitration in hospital labor disputes, with a majority of labor spokesmen opposing arbitration, and a majority of management spokesmen in favor.¹²² However, important exceptions on each side precluded any stigmatization of the statute as management-inspired. The major recommendation was modest enough: the cabinet was to be given power to send a dispute to arbitration only if in its judgment "patient care is adversely affected or seriously threatened," or if either party had been judicially found to be bargaining in bad faith.¹²³

However, the statute as enacted went much further. While hospital employees were in all other respects made subject to the Labour Relations Act,¹²⁴ upon the breakdown of negotiations and the exhaustion of compulsory conciliation procedures, arbitration is automatically set in motion,¹²⁵ and all strikes are prohibited.¹²⁶ Since the Act came into force in April, 1965, approximately twenty cases have gone to arbitration, while some one hundred fifty agreements have been consummated in direct negotiations or with the aid of a conciliator, a pattern which to some extent refutes the claim that the easy availability of arbitration will stultify bargaining.

In terms of institutional arrangements, arbitration is to be conducted by tripartite *ad hoc* boards with the broadest possible mandate to gather evidence and to receive submissions on the matters in controversy, subject only to due process considerations.¹²⁷ The award of the board is to be incorporated in a binding collective agreement which the board is empowered to formulate should the parties be unable to do so.¹²⁸ The real gaps in the legislation, however, are the failure to provide the board either with criteria for judgment or a reliable source of statistical data beyond that which the parties adduce or the board can gather by its own initiative.¹²⁹

It is in relation to these two matters that the new federal Public Service Staff Relations Act¹³⁰ can be considered model legislation. Upon certification, a bargaining agent representing public employees is obliged to elect between arbitration and strike as the method it proposes to pursue for the resolution of negotiation disputes with the government.¹³¹ Subject only to the union's right to

121. C. E. Bennett, Report of Royal Commission on Compulsory Arbitration in Disputes Affecting Hospitals and Their Employees (Ont. 1964).

122. *Id.* 26.

123. *Id.* 50 *passim*.

124. Hospital Labour Disputes Arbitration Act, [1965] Ont. Stat. c. 48, § 2(2).

125. *Id.* § 4.

126. *Id.* § 8.

127. *Id.* § 5.

128. *Id.* § 7.

129. See Matter of Welland County General Hospital, 16 Lab. Arb. Cas. 1 (1965); Matter of St. Joseph's Hospital, 16 Lab. Arb. Cas. 353 (1965).

130. [1967] Can. Stat. c. 72.

131. *Id.* §§ 36, 59.

re-elect,¹³² and to the designation of non-striking "essential" employees,¹³³ it is this voluntary surrender of the right to strike which creates the binding obligation to arbitrate. But if resort to arbitration is a matter of free choice, it has been made an attractive one. Instead of entrusting arbitration to a series of *ad hoc* boards, a permanent independent tripartite Arbitration Tribunal was established. Its permanence was viewed as some assurance that "it would be able in time to gain a deep understanding of the Public Service," to develop "some measure of continuity in the standards . . . on which arbitral awards are based," and to gain "the respect and confidence upon which the success of the whole system will ultimately depend."¹³⁴ Moreover, instead of simply instructing the arbitrators to "examine into and decide on matters that are in dispute," as does the Ontario hospital statute,¹³⁵ the federal act carefully specified the criteria for decision-making.¹³⁶ Equally important, an independent paid research bureau has been established under the administrative aegis of the Public Service Staff Relations Board to provide accurate statistical data both to the parties and to the Arbitration Tribunal, which should greatly enhance the quality of both argument and decision-making.

III. CONCLUSION

Why has Canadian legislation on public interest dispute settlement taken so many forms, been so often amended, and so greatly expanded in recent years?

In part, the diversity of legislation reflects a diversity of political philosophies and socio-economic environments throughout the country. For example, the pioneering public employment statute¹³⁷ was passed in 1944 in Saskatchewan by the first C.C.F. (socialist) government, which was ideologically committed to the extension of collective bargaining. The sweeping Alberta legislation¹³⁸ was enacted by a right-wing Social Credit government. The Quebec situation can

132. *Id.* §§ 37(2), 38.

133. *See supra* p. 47.

134. Report of the Preparatory Committee on Collective Bargaining in the Public Service 35 (Can. 1965).

135. Hospital Labour Disputes Arbitration Act, [1965] Ont. Stat. c 48, § 6(1).

136. *See* [1967] Can. Stat. c. 72, § 68 which provides:

In the conduct of proceedings before it and in rendering an arbitral award in respect of a matter in dispute the Arbitration Tribunal shall consider

- (a) the needs of the Public Service for qualified employees;
- (b) the conditions of employment in similar occupations outside the Public Service, including such geographical, industrial or other variations as the Arbitration Tribunal may consider relevant;
- (c) the need to maintain appropriate relationships in the conditions of employment as between different grade levels within an occupation and as between occupations in the Public Service;
- (d) the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered; and
- (e) any other factor that to it appears to be relevant to the matter in dispute.

137. *See* authorities collected in *supra* note 29.

138. Alberta Labour Act, Alta. Rev. Stat. c. 167, § 99 (1955), *as amended*, [1960] Alta. Stat. c. 54.

only be understood against the background of French Canada's new self-assertiveness.

In part, the legislation reflects the evolution of trade union militancy, and of public attitudes towards the strike. On the one hand, formerly somnolent groups such as teachers, public employees, and to some extent hospital workers, have begun to demand, to receive, and to exercise the right to bargain collectively which other groups have enjoyed for a generation. Lacking experience and with a backlog of ungratified expectations, these groups may be particularly strike-prone. On the other hand, groups, such as railway employees, which have traditionally enjoyed and exercised the right to strike are now encountering public intolerance of any disruption of service. Always immanent when inconvenience and economic loss is thrust on the public during a labor dispute, this intolerance may be intensified by a growing conviction, in many fields of economic activity, that the public interest is to be preferred over private freedom of action. If there is a widespread demand for regulation of insurance rates and interest rates, of grocery prices and packaging, is it surprising that the wage bargain and the processes by which it is struck should likewise engage public concern? If utilities and railways are to be forbidden to discontinue service where the public convenience is threatened, should not their employees be subject to similar constraints? Implicit in this line of argument, of course, is the growing conviction that the labor movement no longer needs, or deserves, the freedom of action it enjoyed when its very existence was at stake.

In part, finally, the legislation has often been sired by crisis, and thereafter it bears the bar sinister of "strike-breaking," if it does not die at birth from the sheer ineptitude of its draftsmen. Two prominent exceptions to this syndrome are the Ontario hospitals statute,¹³⁹ and the federal Public Service Staff Relations Act,¹⁴⁰ both of which were the product of intensive investigation and study, and both of which seem likely to perform usefully in the years to come.

Beyond these considerations, however, an iron law of public interest disputes seems to hold all such legislation within its grip. As two American commentators have stated:

If the parties are not faced with the consequences of refusing to settle, their desire, determination or even ability to settle dwindles. This has occurred under each and every law or procedure, federal and state, legal and extralegal, which has been in existence. No strike control law or extralegal method has succeeded in avoiding this pitfall. . . . Emergency disputes thus create their own rationale. Behaviour becomes tailored to the laws. The more laws enacted, the more "emergencies" are created, and the more "necessary" become the laws.¹⁴¹

Canadian legislative experience largely seems to confirm this unhappy generalization.

139. Hospital Labour Disputes Arbitration Act, [1965] Ont. Stat. c. 48, § 2(2).

140. See [1967] Can. Stat. c. 79.

141. H. Northrup & G. Bloom, *Government and Labour* 420-21 (1963).